

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

CLARENCE REED; LORINE BUXTON; and

FRANK BLUNTSON

PLAINTIFFS

vs.

NO.

4:01CV85-D-B

AMERICAN GENERAL LIFE & ACCIDENT
INSURANCE COMPANY; RICHARD W. HILL;
CLYDE NIX; JOHN ODEN; and JERRY
SATCHEL; et al.

DEFENDANTS

OPINION

Presently before the court is the Plaintiffs' motion to remand this matter to the Circuit Court of Humphreys County, Mississippi. Upon due consideration, the court finds that the motion should be granted and this cause remanded to state court for ultimate resolution.

A. Factual Background

The Plaintiffs in this action are three individuals who purchased various types of life and hospitalization insurance policies from the Defendant American General Life & Accident Insurance Company (American General) between 1969 and 1986.

The Plaintiffs filed suit in the Circuit Court of Humphreys County, Mississippi, on February 1, 2001, alleging that American General, as well as the four individual Defendant agents - Richard W. Hill, Clyde Nix, John Oden and Jerry Satcher - engaged in conduct that renders them liable under various Mississippi state law causes of action, including fraudulent misrepresentation and fraudulent concealment. The Defendants removed the action to this court on April 12, 2001, pursuant to 28 U.S.C. §§ 1332 and 1441, on the basis of diversity jurisdiction. Thereafter, on May 8, 2001, the Plaintiffs motioned the court to remand this matter to state court.

B. Standard for Remand

The Judiciary Act of 1789 provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a). Original federal diversity jurisdiction exists "where the matter in controversy exceeds the sum or value of \$75,000.00, exclusive of interest and costs, and is between . . . citizens of different States." 28 U.S.C. § 1332(a); Sid Richardson Carbon & Gasoline Co. v. Interenergy Res., Ltd., 99 F.3d 746, 751 (5th Cir. 1996). In this case, there is no dispute that the amount in controversy exceeds \$75,000.00. The Plaintiffs, however, assert that the court does not possess diversity jurisdiction because this action is not between citizens of different states, as is required by 28 U.S.C. § 1332.

The Plaintiffs and the four individual Defendants are resident citizens of Mississippi. This fact, however, will not destroy federal diversity jurisdiction if the Plaintiffs fraudulently joined all of the individual Defendants in order to defeat diversity. Rodriguez v. Sabatino, 120 F.3d 589, 591 (5th Cir. 1997). But, if the court finds that any one of the in-state individual Defendants has not been fraudulently joined, then federal diversity jurisdiction is lacking, and the court must remand this matter to state court. See Whalen v. Carter, 954 F.2d 1087, 1094 (5th Cir. 1992) (federal diversity jurisdiction exists only if no plaintiff is a citizen of the same state as any defendant); Wright v. Combined Ins. Co. of America, 959 F. Supp. 356, 361 (N.D. Miss. 1997).

The party alleging fraudulent joinder bears the burden of persuasion, and that burden is quite stringent. See Hart v. Bayer Corp., 199 F.3d 239, 246 (5th Cir. 2000) ("The burden of persuasion placed upon those who cry 'fraudulent joinder' is indeed a heavy one."). In order to prove that a non-diverse party has been fraudulently joined by a plaintiff hoping to defeat diversity, the removing party must demonstrate either "outright fraud in the plaintiff's recitation of jurisdictional facts," or that there is "absolutely no possibility that the plaintiff will be able to establish a cause of action against the

in-state defendant[s] in state court." Hart, 199 F.3d at 246.

The Defendants here do not allege outright fraud, so the court must determine whether there is absolutely no possibility that the Plaintiffs will be able to establish a cause of action against any of the individual Defendants in state court. In making this determination, the court evaluates all of the factual allegations in the Plaintiffs' state court pleadings in the light most favorable to the Plaintiffs, and the court examines relevant state law and resolves all uncertainties in favor of the Plaintiffs. Hart, 199 F.3d at 246. Further, in evaluating a claim of fraudulent joinder, the court does not focus on whether the Plaintiffs will prevail on the merits of their claims. Instead, the court determines whether there is a possibility that the Plaintiffs will be able to state a claim against any of the allegedly fraudulently joined individual Defendants. Rodriguez, 120 F.3d at 591.

C. Discussion

Whether a case states a cognizable claim against a defendant is determined by reference to the allegations made in the plaintiff's original pleadings, although the court may "pierce" those pleadings in making its determination. B, Inc. v. Miller Brewing Co., 663 F.2d 545, 549 (5th Cir. 1981); Wheeler v. Frito Lay, Inc., 743 F. Supp. 483, 485 (S.D. Miss. 1990). In the case at bar, the Plaintiffs allege, *inter alia*, that the individual Defendants committed fraud in connection with their handling of the Plaintiffs' insurance policies.

Under Mississippi law, an agent for a disclosed principal can be held personally liable for his own tortious acts committed within the scope of his employment, and a tort claim can be maintained against that agent. Hart, 199 F.3d at 247. The agent is subject to personal liability when he "directly participates in or authorizes the commission of a tort." Hart, 199 F.3d at 247 (quoting Mississippi Printing Co., Inc. v. Maris, West & Baker, Inc., 492 So. 2d 977, 978 (Miss. 1986)).

The Plaintiffs have alleged that the Defendant Richard W. Hill, as an agent of American General, directly participated in the commission of at least one tort, fraud, while within the scope of his employment. See Complaint pp. 5, para. 22-24. The Defendants assert, however, that the Plaintiffs'

claims against Hill are barred by the applicable statute of limitations, which requires actions such as this to be commenced within three years after the causes of action accrue. See Miss. Code Ann. § 15-1-49 (1972). In support of their position, the Defendants point out that the policy sold by Hill was purchased more than three years prior to the filing of this suit, and that under Mississippi law, a cause of action for fraud or misrepresentation accrues upon completion of the sale induced by the false representations or upon consummation of the fraud or misrepresentation. Dunn v. Dent, 153 So. 798, 798-99 (Miss. 1934).

In response, the Plaintiffs cite Section 15-1-67 of the Mississippi Code, which tolls the statute of limitations in cases of fraudulent concealment. Specifically, it provides that

If a person liable to any personal action shall fraudulently conceal the cause of action from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence might have been first known or discovered.

Miss. Code Ann. § 15-1-67 (1972).

In order to invoke Section 15-1-67, the Plaintiffs must allege that Hill engaged in an affirmative act of concealment, so as to prevent the Plaintiffs from discovering their claims against him. Reich v. Jesco, Inc., 526 So. 2d 550, 552 (Miss. 1988). The Defendants assert that the Plaintiffs have not adequately alleged that Hill took affirmative acts of concealment, subsequent to the sale of the Plaintiffs' insurance policies, that prevented the Plaintiffs from discovering their claims against him.

The court finds, however, that the Plaintiffs have sufficiently alleged, in paragraphs 57 and 58 of their Complaint, that Defendant Hill engaged in affirmative acts of concealment that prevented the Plaintiffs from discovering this cause of action until such time as to render the filing of this suit untimely. See Phillips v. New England Mut. Life Ins. Co., 36 F. Supp. 2d 345, 349-350 (S.D. Miss. 1998) (similar allegations of fraudulent concealment by individual agent deemed sufficient to potentially toll statute of limitations). In other words, the Plaintiffs have alleged specific facts that, if proven, make it possible for the state court to toll the statute of limitations pursuant to Section 15-1-67.

And, the court finds that the scenario set forth in the Plaintiffs' pleadings, if true, could possibly result in liability being imposed on Hill for his alleged tortious acts. See, e.g., Bank of Shaw v. Posey, 573 So. 2d 1355, 1361-62 (Miss. 1990) (setting forth elements of fraud under Mississippi law). The Plaintiff has sufficiently set forth allegations, in paragraphs 22 through 24 of the Complaint, demonstrating that Hill may have participated in the commission of at least one tort, fraud. As such, Hill faces potential liability for his actions, and the court finds that the Defendants have not demonstrated that there is absolutely no possibility that the Plaintiffs will be able to establish a cause of action against Hill in state court.

D. Conclusion

In sum, the Plaintiffs' complaint, taking all allegations set forth as true, at least raises the possibility that they could succeed in establishing a tort claim against the Defendant Hill under Mississippi law. Accordingly, Hill's citizenship cannot be ignored for the purposes of determining subject matter jurisdiction. His presence in this civil action means that the complete diversity of citizenship necessary to maintain federal jurisdiction over this case is absent. As such, this cause shall be remanded to the Circuit Court of Humphreys County for ultimate resolution.

A separate order in accordance with this opinion shall issue this day.

This the ____ day of August 2001.

Chief Judge

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DEFENDANTS

ORDER

Pursuant to an opinion issued this day, it is hereby ORDERED that

- (1) the Plaintiff's motion to remand (docket entry 7) is GRANTED; and
- (2) this cause is hereby REMANDED to the Circuit Court of Humphreys County, Mississippi.

SO ORDERED, this the ____ day of August 2001.

Chief Judge